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OFFER AND ACCEPTANCE—REVOCATION OF OFFER BY SALE.

Frank et al. v. *Stratford-Handcock et al.*, 77 Pacific Rep. 134 (Supreme Court of Wyoming, June 27, 1904).

The point in the decision of *Frank* v. *Stratford-Handcock* to be especially noted in this article is the revocation of an offer by a sale of the property in question to a third party with notice to the offeree of the sale. The facts, briefly, were as follow: Frank, the defendant, entered into a written agreement with the plaintiff, Kent,—here represented by Stratford and Handcock, her executors,—by which he agreed to lease to Kent certain property for the term of six months. The lease contained a clause giving Kent the right to purchase the property within that time, and concluded with the provision that the lessee (Kent) should deposit $500 with Frank as security for fulfillment of the lease and payment of rent. This deposit was never made. Shortly after making the agree-

ment Frank sold and conveyed the property in question to one McKenzie. Kent remained in possession for several months, until forcibly evicted by McKenzie. Before the expiration of the six months Kent tendered the purchase price to Frank and demanded a deed, which was refused. This action for specific performance of the contract and damages for taking and withholding the property was then brought. The decision of the court was in favor of Frank, the argument which was used being as follows: Where no other consideration is stated or shown, a lease containing a provision for such an option is, together with the affirmative covenants of the lease, a sufficient consideration for the option. In this case, however, there was a condition precedent to the lease becoming effective, namely, the clause providing for a deposit of $500 as security for the fulfillment of the lease. As this deposit was never made the lease never became operative, and the option or offer was without consideration. It might, therefore, be withdrawn at any time before acceptance, and the sale to McKenzie, of which Kent had notice at the time she was evicted from the property, and which occurred before her attempted acceptance, amounted to a sufficient revocation.

The general and fundamental rule of revocation that "an offer may be revoked at any time before acceptance" is so elementary a part of the Law of Contracts that an explanation of it, preliminary to the discussion of the point of this note, is unnecessary. Another well-settled principle of law rules that the revocation of an offer must be communicated or at least brought to the knowledge of the offeree in order that it may take effect, for the law holds that an offer must be considered as continuing during every instant that it is being transmitted and also during the reasonable period allowed for its acceptance, and that the offeree may so regard it until he has some notice of its revocation. The case of *Byrne* v. *Van Tienhoven,* L. R. 5 C. P. Div. 344, 1880, holds that "an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. A state of mind not notified cannot be regarded in dealings between man and man." See also the case of *Tayloe* v. *Merchants' Fire Insurance Co.,* 9 How. 390, 1850. At this point, however, and under the rule of law just stated, arises the question, What is sufficient communication or notice of the withdrawal of the offer that it may amount to a good revocation? This is a question which admits of a rather broad and complex answer owing to the varied circumstances under which it may present itself. A partial answer is found in the case under discussion and in the several parallel decisions, but as yet no complete answer has been obtained, for

cases involving all these circumstances have not appeared for settlement before our courts, and until they do arise certain views of the question must remain undecided.

This uncertainty, of course, does not occur when the offer is expressly revoked, either in words, or by post, or by telegraph, and a revocation thus brought to the knowledge of the offeree before he has accepted the offer is an effectual revocation. In the case of *Moffett* v. *City of Rochester,* 178 U. S. 373, 1899, in which a clerical error in a bid for certain city work was verbally corrected at the reading of the bid before the city council, it was held that a subsequent acceptance of the original bid did not create a contract. See also *Wheat* v. *Cross,* 31 Md. 99, 1869.

There is an uncertainty, however, where the offeror does an act inconsistent with his offer, indicating an intention to revoke, as by sale of the property offered, but does not in any way communicate his revocation. The question is,—Does the knowledge of the offeror's intention to revoke his offer, not coming from the offeror himself nor from any one authorized by him, but from some other source, amount to a good revocation? To give an unqualified affirmative answer to this question would be to make a broad and sweeping statement for the support of which it is impossible to find any authoritative cases; but on the other hand a negative answer is equally impossible.

The point in the decision of *Frank* v. *Stratford-Handcock* to be specially noted bears directly upon this question. In this case Frank clearly showed by his sale and conveyance of the property in question to McKenzie that it was his intention to revoke his offer to Kent. Kent received information of this intention by means of a notice served by McKenzie, who was neither a party to the original agreement between Frank and Kent nor the authorized agent of Frank. The notice came, therefore, from a third person who was neither acting under the authority of the offeror nor was a party to the original transaction. The court, as stated above, held that this was a sufficient communication or notice of the offeror's revocation, and as it was received by the offeree before acceptance of the offer, no contract consequently ever existed.

Directly in point with this decision is the well-known case of *Dickinson* v. *Dodds,* L. R. 2 Ch. Div. 463, 1876. The facts in this case were as follows: Dodds gave to Dickinson a written and signed memorandum in which he agreed to sell to him a certain property, allowing him two days in which to accept or refuse the offer. Before the expiration of the two days Dodds sold the property to another party. Dickinson re-

ceived notice of this sale through his agent, but the information was not conveyed to him or to his agent through Dodds or any one acting in Dodds' behalf. Dickinson tendered a written acceptance, before the time allowed him to decide had expired, which Dodds refused to receive. In his opinion James, L. J., said in part:

"It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now, I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer or what is called a retraction. It must, to constitute a contract, appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance came to nothing."

Mellish, L. J., in affirming this opinion, said:

"I am clearly of the opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of the opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

The leading American case supporting this principle is the case of *Coleman* v. *Applegarth,* 68 Md. 21, 1887. The facts of this case were as follows: Applegarth allowed Coleman an option on certain property, the option being unsupported by any consideration, and then sold the property in question to a third person before the expiration of the time allowed. Coleman became aware of the sale, and tried to accept the offer. The court held that, as the offer was without consideration, it might be withdrawn at any time before acceptance, and the subsequent sale and transfer of the property by Applegarth to the third party, of which Coleman was aware, at once revoked the offer.

The law as apparently laid down in these three cases,—*Frank* v. *Stratford-Handcock, Dickinson* v. *Dodds,* and *Coleman* v. *Applegarth,*—is that the knowledge of an inconsistent act done by the offeror and not expressly communicated by him to the offeree, but obtained by the offeree from some third party not acting under the authority of nor in behalf of the offeror, is a good revocation. To this, however, must be added the very important qualification which was not brought out in any of these cases mentioned, that in each instance no question whatever was raised by the offeree as to the reliability or credibility of the information or notice received. In each case the

offeree accepted the information of the sale as entirely trustworthy, and admitted that it was credible and that he believed it. The law is yet to be determined, however, in those cases where the offeree does not receive the information as being credible and reliable and admit his belief in it, or where the notice or news of the sale is received through some such source as a newspaper, for no such cases have as yet arisen.

The law as stated in the decision of *Dickinson* v. *Dodds* is questioned by Sir William Anson, the eminent English authority on the Law of Contracts (Principles of the English Law of Contracts, 8th Amer. E., 40), who states that "the language used is wider than was needed to cover the facts of the case." The ruling in this case seems to hold that the knowledge of the offeror's intention to revoke, from whatever source it reaches the offeree, is good notice of revocation, and it is against this point that Sir William Anson directs his criticism, although he does say: "It is easy to understand that if the acceptor knew for a fact, though his information had no authority from the offeror, that the offer was revoked, his acceptance would not entitle him to specific performance of the contract." Sir Frederick Pollock, however, agrees with the decision in *Dickinson* v. *Dodds* (5th Ed. Pollock on Contracts 29), as does Mr. Benjamin in his Treatise on the Sale of Personal Property (6th Amer. Ed. 50). See also *Little* v. *Thurston,* 58 Me. 86, 1870, *Suber* v. *Pullin,* 1 S. C. 273, 1869, and Pomeroy on Specific Performance of Contracts, sec. 61.

A review of the case of *Frank* v. *Stratford-Handcock* appearing in the *Harvard Law Review,* vol. xviii, no. 2, pages 139-140, states that "the cases,"—*Dickinson* v. *Dodds, Coleman* v. *Applegarth,* and *Frank* v. *Stratford-Handcock,*—"test the validity of the acceptance, for under modern practice equity can award damages where it is impossible to grant specific performance. This was not done, the court in each instance granting no relief whatever, placing its decision on the broad ground that the attempted acceptance, after knowledge of the negotiation or sale, was ineffectual, and that no contract was formed." The question of the validity of the acceptance seems to have been decided, but the non-award of damages by the court can hardly have been the test, for in but one of the three above mentioned cases, *Dickinson* v. *Dodds,* were damages sought. In the case of *Frank* v. *Stratford-Handcock* damages were asked from the vendee for taking and withholding the property from the offeree, but specific performance only was sought from the vendor. In the case of *Coleman* v. *Applegarth* the bill prayed only for specific performance of the contract, no damages whatever being asked for. The cases do not,

therefore, seem to bear out the statement that in each instance the validity of the acceptance has been fully tested by the failure of the court to award damages, for in but one instance were damages asked for. This does not, however, affect the rule that knowledge of the offeror's inconsistent act, obtained in such manner and accepted by the offeree as credible and trustworthy information, is a sufficient revocation of an offer.

In passing it might be well to note another point brought out in the case of *Frank* v. *Stratford-Handcock,* namely, that a provision or agreement in a lease granting to the lessee the privilege of purchasing within a certain time is an option which may not be revoked within the time allowed for its exercise; and where no other consideration is expressed or shown, the lease with its affirmative covenants is regarded as a sufficient consideration to support the option. This principle is stated in I Warvelle on Vendors, sec. 126, as follows:

"An optional agreement to convey, without any covenant or obligation to purchase, and without mutuality of remedy, will now be enforced in equity if it is made upon proper consideration or forms part of a lease or other contract between the parties that may be true consideration for it."

The ground on which this principle rests is that in taking the lease the lessee pays a higher rent provided the lessor gives him the option of purchasing within a certain time. In the case of *Hall* v. *Center,* 40 Cal. 63, 1870, in which a lease contained a clause granting the privilege of purchasing on or before the expiration of the term, it was held that the contract of the lessors by which they covenanted that the lessee should have the option to purchase or not at his election, was founded on an adequate consideration, and should be enforced. In *Willard* v. *Tayloe,* 8 Wal. 557, 1869, Mr. Justice Field said:

"The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede."

In accord: *Hawralty* v. *Warren,* 18 N. J., Eq. 124, 1866; *Gilbert* v. *Port,* 28 Ohio St. 276, 1876; 18 Amer. and Eng. Encyclopædia of Law, 2nd Ed., 631. The option, however, must comply with the general rules relative to agreements for the sale of land, and if it is uncertain or indefinite, it will not be enforced. I Warvelle on Vendors, sec. 126. *Fogg* v. *Price,* 145 Mass. 513, 1888.

The decision of *Frank* v. *Stratford-Handcock* is, therefore, in accord with the more modern view of the law of revocation. The law as laid down in this case is that a mere proposal, unsupported by any consideration, creates no obligation whatever unless it is accepted according to its terms, and may be revoked at any time before acceptance. And where an inconsistent act on the part of the offeror, showing that it is his intention to revoke the offer, as by sale to a third party of property offered, is brought to the knowledge of the holder of such a voluntary option by some person not acting under authority from nor in behalf of the offeror, and such information is accepted by the offeree, and admitted as credible and trustworthy, such inconsistent act, of which the offeree has knowledge, is a sufficient revocation of the offer, and the knowledge of this act, thus received and accepted, is sufficient notice or communication of the revocation to make it effective.

J. K. F.